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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 640

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, OR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM W. KLEINMAN and EUGENE GOLD,
Attorneys for Petitioner,
66 Court Street,
Brooklyn 1, New York.

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Kings County, entered in the above entitled case as further described *infra*; or, should such be jurisdictionally more appropriate, to review the respective orders of the Court of Appeals of the State of New York and of a single Judge of that Court, which have also been entered in the above entitled case and which are likewise further described *infra*.

Opinions Below

The memorandum decision of the Supreme Court of New York, Kings County, printed in the appendix hereto *infra*, p. 28, is not reported. The Appellate Division of the Supreme Court of the State of New York, Second Department, in dismissing the appeal, rendered no opinion. The Court of Appeals of the State of New York, and Judge Fuld of that Court, in respectively denying permission or leave to appeal, rendered no opinion.

Jurisdiction

The order of the Supreme Court of the State of New York, Kings County, denying petitioner's motion which sought to institute a distinct proceeding to vacate an *ex parte* telephone wiretap Court order, was entered on February 26, 1963 (appendix, *infra*, pp. 32-33). Petitioner filed timely notice of appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, on March 22, 1963. The Appellate Division granted a motion by the respondent to dismiss the appeal, on April 17, 1963 (appendix hereto *infra*, p. 26). Petitioner made timely applications, respectively, to a single Judge of the Court of Appeals of the State of New York and to that entire Court for permission or leave to appeal, both of these applications being denied on July 10, 1963 (appendix hereto *infra*, pp. 24-25). Upon timely application, Mr. Justice Harlan granted petitioner an extension of time within which to file a petition for a writ of certiorari to and including November 15, 1963, and prior to the expira-

tion of that time Mr. Justice Harlan further extended the time within which to file a petition for certiorari to and including November 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1275(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 (as given supremacy by Article VI of the Constitution of the United States). A possible jurisdictional problem (the possible existence of another adequate State remedy) is noted *infra*.

Question Presented

Whether a State Court *ex parte* telephone wiretap order which is challenged by the victim thereof on Federal grounds may be totally and permanently shielded from subsequent judicial review of the constitutionality of such issuance merely because no state statutory procedure for such challenge or review has been provided, or merely because the person seeking such review is unable (i.e., intrinsically and inevitably unable in the nature of the *ex parte* procedural situation with which he is confronted and because he is denied access to the sealed judicial records) to plead or aver a *prima facie* case of unconstitutional issuance of the wiretap order.

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination) and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: Code Crim. Proc. §§813-a, 813-c, 813-d and 813-e; C.P.L.R. §4506, formerly C.P.A. §345-a. These Federal and State statutory provisions are quoted in the appendix hereto *infra*, pp. 34 et seq.

Statement of the Case and of How the Federal Questions are Presented

Our citations to the record will refer principally to the "Record Printed for Court of Appeals on Motion for Permission to Appeal: Consisting of Record of Proceedings in Appellate Division, Second Department, and Supreme Court, Kings County" (cited herein as "RI "), and to the printed "Notice of Motion, Affidavit and Memorandum for Leave to Appeal to Court of Appeals" (cited herein as "RII "). Both of these printed items are included in the certified Record filed herein, and nine extra copies of each of said items are filed herewith. It will also be necessary, for discussion of the previously mentioned possibility of another adequate State remedy, to refer to a parallel pending proceeding the record of which is not presently before this Court.

Petitioner, a physician licensed by the State of New York, was indicted for abortion under five indictments in Novem-

ber, 1960 by the Grand Jury of Kings County, New York (RII 4). These indictments have not yet been brought to trial; the trial awaits the disposition of certain proceedings, including the instant one, that were brought by petitioner for the suppression of evidence.

In order to give this Court the entire relevant procedural setting of the phase of the evidence-suppression controversy to which this petition for certiorari is addressed, it is necessary to refer to a related proceeding for suppression of evidence, which is presently pending in the State courts. The subject matter of the instant certiorari proceedings began with the previously mentioned State court motion (see details *infra*) challenging the validity of an *ex parte* Court order allowing a wiretap of petitioner's private office telephone. Prior to this State court motion of ours challenging the wiretap order, we had brought a State court motion to suppress evidence which we claimed was seized in an illegal search of petitioner's office, as well as to suppress wiretap evidence. The record relating to the latter proceeding for suppression of evidence is the one above referred to as not being before this Court in the instant proceeding but as needing to be referred to here because of the question of "other adequate state remedy."

The aforesaid separate motion-to-suppress proceeding in the State courts is presently pending in the Supreme Court of the State of New York, Kings County, before the Honorable Mr. Justice Rinaldi. The evidentiary hearing before Justice Rinaldi on the motion to suppress was concluded on October 1, 1963. A decision by Justice Rinaldi is expected fairly soon. This will be of interest to this Court, we assume, because of the above mentioned possibility that the

proceeding before Justice Rinaldi may be deemed by this Court to affect the question of other-adequate-State-remedy.

The following further facts relating to the latter motion-to-suppress proceeding are relevant: The indictment of petitioner for abortion in November 1960 had been preceded by an arrest and search on September 3, 1960, during the hours shortly following midnight. Neither the arrest nor the search were made upon a warrant. Petitioner is claiming in the separate motion-to-suppress proceeding that the arrest and search were unconstitutional. Petitioner's person was searched at his home in Neponsit, Queens, where the arrest occurred, and from there the State police officers took petitioner in their automobile to his office in Brooklyn, where the police entered by breaking a rear cellar door lock. The office was intensively searched and office records pertaining to numerous female patients of petitioner were seized. The principal item of these records, a desk diary, which the police admitted seizing, was later said by them to have been "lost" or "misplaced" and it has not been produced by the police to this day.* In examining petitioner's office records the police admitted that they came prepared with lists of names of female patients of petitioner. A prime issue in the motion-to-suppress proceeding is whether these names were the product of antecedent telephone wiretap leads. Petitioner is contending in the motion-to-suppress proceeding that the police information which led to the abortion indictments came either from

* The police claimed consent by petitioner for the search of his office. This consent is denied by petitioner, and in the State court motion-to-suppress proceeding he produced witnesses who were undisputedly present when the consent is supposed to have been given and who denied the police assertions in this regard. Justice Rinaldi's forthcoming decision in the motion-to-suppress proceeding will presumably determine, *inter alia*, this issue of consent.

wiretap leads, or from the "lost" diary seized by the police during the search of his office, or from both of these sources.*

At the time when petitioner first instituted his motion-to-suppress proceeding in the State Court (March 1962) he had no knowledge, but only a suspicion, that his office telephone had been tapped by the police or prior to the search prior to the indictments (November 1960) (September 3, 1963). In April 1962, during one of the early sessions in the State court motion-to-suppress proceeding, petitioner first learned positively that there had been a telephone wiretap, respondent having admitted in open Court that this was the case, that the wiretap had been authorized under an *ex parte* court order issued on July 28, 1960, pursuant to N.Y. Code Crim. Proc. §813-a, and that the wiretap had been maintained from July 29, 1960 until September 2 or 3, 1960 (the latter being the date of petitioner's arrest and of the search of his office).

After this disclosure in April 1962 about the wiretap, the motion-to-suppress proceeding lagged for some months owing to circumstances which are not here pertinent. Then, on January 23, 1963 the State Court in which the motion-to-suppress proceeding was pending ordered an adjournment for the purpose of enabling petitioner to institute a separate proceeding for the exclusive purpose of testing out the validity of the *ex parte* telephone wiretap order. Such separate proceeding was instituted on the following day (January 24, 1963), by a notice of motion in the Supreme Court

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* The motion-to-suppress proceeding also disclosed that the police had lost or destroyed numerous other records, consisting of their own notes and memoranda which they are required by Police Department regulations to keep.

of the State of New York, County of Kings, which came on before Mr. Justice Arkwright of that Court. This was the commencement of the proceeding in which the instant petition for certiorari arises.

The separate proceeding to vacate the *ex parte* wiretap order encountered from the outset the difficulty that there existed no State statutory procedure for such a proceeding. The motion papers were captioned in the same criminal proceeding in which the indictments and the motion to suppress were pending (RI 6), but it was petitioner's theory (see further as to this *infra*) that he was endeavoring to bring on an entirely distinct proceeding which, if necessary, could and should be treated as a proceeding on the civil side of the calendar for the purpose of invoking what petitioner deemed to be the inherent jurisdiction of a State court of general original jurisdiction (the Supreme Court of the State of New York*) to hear and determine a claim of constitutional aggrievement by a citizen (RII 13).

The specific relief sought by the separate proceeding addressed to the wiretap order was the vacating and setting aside of that order after a hearing on the question of whether there had been compliance with the statutory requirements (N.Y. Code Crim. Proc. §813-a**), and for such other and further relief as the Court might consider just and proper (RI 6-10).

Another difficulty encountered by petitioner from the outset of his separate proceeding to vacate the *ex parte*

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* See N.Y. Const. Art. 6, §7(a).

** As will appear, these statutory requirements (quoted in the appendix hereto, *infra*, p. 35) import (or they should import in order to satisfy Federal Constitutional standards) the Federal Fourth Amendment standards of reasonable search.

wiretap order was, of course, that, as petitioner stated in his moving papers in that proceeding, "the precise contents of any affidavit submitted in support of the application for a court order is not known to the defendant [i.e., the present petitioner], nor can the defendant or his counsel state with certainty the substance of the information furnished to the Court [i.e., the Court which had issued the *ex parte* wiretap order]"; this very circumstance, however, petitioner urged, entitled him "to a hearing to determine whether the information submitted to the Court was legally sufficient to support the *ex parte* order authorizing the telephone interception" (RI 9-10).

The affidavit in support of petitioner's motion to vacate the *ex parte* wiretap order further stated (RI 9):

> "Section 813(a) of the Code of Criminal Procedure provides in part, that an ex parte order for eavesdropping may issue if 'there is reasonable ground to believe that evidence of crime may be thus obtained.'
>
> "The contention is made here that at the time of the application there was no proof submitted to the Court establishing such reasonable ground."

Respondent, in opposing the separate proceeding to vacate the wiretap order, urged that the proceeding was not maintainable at all by reason of lack of any State procedure for the purpose so that these *ex parte* wiretap orders once made are not thereafter reviewable by any court or judge; and that in any event the supporting affidavits upon which the *ex parte* order was issued were adequate to show reasonable cause under the statute. However, with respect to the latter contention respondent also urged that the supporting affidavits were secret and must be kept secret at all costs, wherefore respondent surrendered those affi-

davits for inspection only by the Court itself, reserving the position that "this submission is not to be deemed an acknowledgment * * * of the propriety of the present motion. It is made solely for the convenience of the Court * * * " etc. (RI 12-13).

In the argument before Justice Arkwright on the motion to vacate the *ex parte* wiretap order petitioner urged, *inter alia, that* "the law of the land," as enunciated by the Supreme Court of the United States for the protection of "the community * * * from frivolous applications for wiretap orders" and for the protection of the "substantial right * * * of every human being, to remain free from this kind of intrusion", and as enunciated also in New York State's own permissive wiretap legislation (Code Crim. Proc. §813-a) and in §605 of the Federal Communications Act (U.S.C. Title 47), required that the Supreme Court of the State of New York exercise "its inherent power to review such an order" (RII 10-13).

Justice Arkwright denied the motion to vacate the *ex parte* wiretap order in a decision dated February 6, 1963 (appendix hereto *infra*, p. 28) upon which an order was filed February 26, 1963 (*id.*, p. 32). Justice Arkwright did not make any determination that the information supplied to the Judge who issued the *ex parte* wiretap order was sufficient. Instead, Justice Arkwright's decision was addressed to the question of whether the showing made by petitioner's affidavit in support of the motion to vacate the wiretap order was sufficient to establish that no sufficient proof had been submitted to the prior Judge. Justice Arkwright's decision contains no indication that he had himself made a judicial evaluation as to the adequacy, in terms of the "reasonable grounds" requirement of §813-a

of the Code of Criminal Procedure, of the showing which had been made in support of the *ex parte* wiretap order. *A fortiori* Justice Arkwright did not, of course, conduct any hearing or trial as to the adequacy of the showing in support of the *ex parte* wiretap order (*id.*, pp. 28-31).

Such hearing or trial was not conducted by Justice Arkwright partly because of his conclusion that the affidavit submitted on behalf of petitioner was not sufficient to negate the sufficiency of the showing in support of the *ex parte* wiretap order, and partly because the need for secrecy (as urged by the District Attorney) in regard to such *ex parte* wiretap application matters, precluded the holding of any such hearing or trial (*ibid.*).

Nevertheless Justice Arkwright recognized that a troublesome issue is presented as to any proposed theory which would altogether preclude judicial reconsideration of such *ex parte* wiretap orders. Thus, Justice Arkwright said: "Although the code, as is conceded, contains no provision for a review of the original order, it is not likely that it will be here argued that on a proper application, a justice could not reconsider or vacate his own order." Then Justice Arkwright went on to state that in situations where the Justice who issued the original *ex parte* order is no longer on the Bench, "a circumstance applicable here, a different problem arises". As to this latter type of situation, Justice Arkwright went on to suggest that "In a hypothetical case" where "perjury" or "error" by an affiant who had made an affidavit in support of the *ex parte* order should be discovered afterwards, "or should some other equally cogent reason present itself, a reconsideration certainly would be proper and necessary in the interests of justice. The authority to review the order in those

cases is inherent in the court". Justice Arkwright, however, concluded that "No such situation has been presented here" (*id.*, pp. 30-31).

On appeal taken to the Supreme Court of New York, Appellate Division, Second Department, by petitioner from Mr. Justice Arkwright's order denying the motion to vacate the *ex parte* wiretap order, respondent moved to dismiss the appeal on the ground that no statutory basis existed in the State of New York for appealability of such an order viewed in either a criminal or civil procedural aspect (RI 37-42). Petitioner, opposing respondent's motion to dismiss the appeal in the Appellate Division, urged that the proceedings in connection with the original granting of the *ex parte* wiretap order itself and the proceedings on the motion before Mr. Justice Arkwright to vacate said wiretap order were independent of the pending criminal indictment proceedings, and that the appeal from Justice Arkwright's order was civil in nature and governed by the State appellate jurisdictional provisions for civil appeals (RI 43-46). On April 17, 1963 the Appellate Division granted respondent's motion to dismiss the appeal, without opinion; an order dismissing the appeal was entered on the same date; service of notice of entry of said order with copy thereof dated April 25, 1963 was accepted by petitioner on May 15, 1963 (RI 47-50; RII 22).*

* We recite these dates, as well as the other specific dates of a similar nature *supra*, for their bearing on the issue of the timeliness of petitioner's procedural steps in the Courts below at each stage. No such issue of timeliness is or can be raised by respondent, but we nevertheless set forth the dates so that this Court may have before it the requisite jurisdictional facts showing that our appeals in the Courts below were not defeated on grounds of failure to perfect the appeals in time. Since no issue as to this is actually (or can be) presented, we refrain from burdening the Court with the State statutory and case law citations relating to this subject.

Petitioner then sought leave to appeal to the Court of Appeals of the State of New York, first by an application to an individual Judge of that Court (Honorable Stanley H. Fuld) on the theory that the matter might be deemed "criminal" in nature within the meaning of §520 N.Y. Code Crim. Proc. (RII-7), this application being denied without opinion by Judge Fuld on July 10, 1963 (appendix hereto, *infra;* p. 25); and secondly and concurrently, Petitioner sought such leave to appeal by an application to the full Court of Appeals pursuant to the Civil Practice Act of New York on the alternative theory that the matter might be deemed "civil" in nature (RII, *passim*), this application likewise being denied on July 10, 1963 by the full Court of Appeals, without opinion (appendix hereto, *infra*, p. 24).

Petitioner's contentions before the Court of Appeals on the legal and constitutional merits of the wiretap issue were set forth in a memorandum of law and an affidavit (RII 3-54). Those contentions were summarized in the affidavit as follows (*id.* 22-25):

> "* * * (1) The *ex parte* wiretap order herein was illegal, whether or not the 'reasonable grounds' requirements of §813-a of the Code of Criminal Procedure were complied with, because all wiretapping is in violation of the Federal Communications Act (47 U.S.C. §605). (2) Even if the aforesaid provision of the Federal Communications Act did not exist, the instant *ex parte* wiretap is unconstitutional under the Fourth and Fourteenth Amendments of the Federal Constitution as an unreasonable search and seizure unless 'probable cause' existed for the issuance of the 'warrant' herein (i.e., the *ex parte* wiretap order) and, indeed, the federal constitutional prohibition against unreasonable searches and sei-

zures would be violated even where such 'probable cause' ostensibly existed because all wiretaps, owing to their intrinsically offensive character and their sheer repellency to principles of civilized government and decent society, are *ipso facto* 'unreasonable' searches and seizures—just as would be any of the other more arrant form of search and seizure which the Constitution unqualifiedly prohibits (irrespective of the presence *vel non* of 'probable cause'), such as searches and seizures accompanied by excessively brutal, violent or otherwise offensive methods for extracting information involuntarily from the citizen. (3) To the extent that the issue of the constitutionality of the instant *ex parte* wiretap order does turn upon the adequacy of the showing of the 'probable cause' or 'reasonable grounds' in support of the obtaining of said wiretap order, the appellant-movant Dr. Cohen was and is entitled to a judicial hearing on the issue of such adequacy, he has had in effect no such hearing whatever, and irrespective of the posture of the statutory remedies presently afforded in this State it is constitutionally incumbent upon the State courts to afford such a hearing under their inherent judicial powers and obligations pursuant to the Supremacy Clause of the Federal Constitution (Article VI) which imposes upon the State judiciary the paramount duty of vindicating the primacy of the Constitution and Laws of the United States—a duty which also devolves upon the State judiciary pursuant to our own State Constitution, and, indeed, pursuant to the very provisions of §813-a of the Code of Criminal Procedure itself. (4) Justice Arkwright erred in not holding such a constitutionally (and statutorily) required hearing on the issues of the reasonableness of the search and seizure of this *ex parte* wiretap order as well as on

the issues of its federal statutory permissibility under §605 of the Federal Communications Act. (5) Irrespective of whether the appeal which Dr. Cohen took to the Appellate Division be viewed as having been taken pursuant to §517 of the Code of Criminal Procedure or pursuant to §§609 to 612 of the Civil Practice Act, the 'constitutional fact' remains that as of the present posture of this proceeding, the appellant-movant Dr. Cohen stands deprived of his federal and state constitutional right to a judicial hearing as to the question of the 'probable cause' or 'reasonable grounds' for the search and seizure to which he was subjected by virtue of the *ex parte* wiretap and in effect has been denied all judicial hearing or judicial test of its constitutional (or statutory) propriety. (6) In these circumstances, it is either constitutionally obligatory upon the Honorable Judge Stanley M. Fuld, acting pursuant to §§519 and 520 of the Code of Criminal Procedure under the application which was presented to him on May 3, 1963, or it is constitutionally obligatory upon this entire Court acting pursuant to §§589 and 592 of the Civil Practice Act under the instant motion for permission to appeal, to grant Dr. Cohen's right of further appeal in this Court so that a proper order may be made remanding this matter with instructions to hold a judicial hearing on the issues of the constitutional and statutory adequacy of the alleged showing of 'probable cause' or 'reasonable grounds' for the issuance of the within *ex parte* telephone wiretap order."

As to how the Federal questions are presented, we respectfully note that in the course of the foregoing Statement of the Case we have recited the ways in which petitioner presented his constitutional contentions in the

Courts below. As seen, petitioner formulated the Federal constitutional issues with particular explicitness before the Court of Appeals. That Court, by denying leave to appeal must be deemed to have decided that Justice Arkwright's determination should stand undisturbed notwithstanding the Federal constitutional objections which petitioner urged against that determination both before Justice Arkwright and in the Court of Appeals.

Because of the peculiar way in which the issue of appealability in the two appellate Courts below became interwoven in this case with the issues of substantive constitutional right which petitioner had claimed in the Court of first instance (before Mr. Justice Arkwright), and as to which rights he unavailingly sought appellate vindication to relieve him of the consequences of Justice Arkwright's having cut him off from those rights without any meaningful judicial hearing whatever, this case comes before this Court in a perhaps uncertain jurisdictional posture as respects the question of whether the "final judgment" here to be reviewed is the order (or orders) of the Court of Appeals (and of Judge Fuld) denying leave to appeal or the order of Justice Arkwright denying the motion to vacate the *ex parte* wiretap and to obtain a hearing. It is this possible uncertainty which has prompted us to structure this petition for certiorari as seeking review, alternatively, of one or the other of the two (or three) last-mentioned orders below.

There is no uncertainty, however, we submit, that the Federal questions are properly presented, whichever of the latter orders be deemed the "final judgment" herein—and we argue under the "Reasons for Granting the Writ"

infra, that these properly presented Federal questions are substantial ones..

We note also that, if the "final judgment" be deemed to be Justice Arkwright's order, the time for filing our petition for certiorari "runs from the date of the higher Court's refusal to review" (Stern and Gressman, *Supreme Court Practice*, (3rd Ed.), p. 88).

As regards the question earlier mentioned of whether the presently continuing pendency of our separate State court motion-to-suppress proceeding may portend the existence of another adequate State remedy for disposition of our wiretap contentions, it seems to us that the only proper representation which we can make to this Court consists of an adequate recital of the pertinent facts concerning said motion-to-suppress proceeding in relation to the instant proceeding, and that is what we are trying to do herein. It does also seem to us, however, that, until Justice Rinaldi renders his decision in the motion-to-suppress proceeding, it cannot be known whether "another adequate State remedy" will emerge therefrom. Justice Rinaldi's determination may range all the way from a ruling that *ex parte* wiretap orders in New York State are not judicially reviewable at all in that State's courts, to a ruling that the *ex parte* wiretap order here involved is invalid and shall be vacated. A ruling in the former category, or in some variation thereof which cannot now be foretold, would point to the conclusion that there is no "other adequate State remedy"; a ruling of the latter category would, of course, render this certiorari proceeding moot in the most total sense. This Court may, therefore, wish to await the outcome of the motion-to-suppress

proceeding before finally disposing of the instant petition for certiorari.

The question of State Court appealability of Justice Rinaldi's forthcoming decision is, to be sure, still another matter, and one about which nothing very helpful can be said at the present juncture. We may say, however, that if we lose before Justice Rinaldi on a Federal ground and find ourselves definitively precluded from State court appellate review except by awaiting ultimate appeal from a conviction under the indictments, we shall expect to consider coming back to this Court either *via* a new and separate petition for certiorari or *via* an amended or supplemental petition aimed at combining the motion-to-suppress matter with the subject matter of the instant petition for certiorari. We mention this possibility at this time as an additional consideration which this Court may wish to take into account in deciding whether to defer a final disposition of the instant petition for certiorari until after Justice Rinaldi decides the pending motion-to-suppress proceeding.

The peculiarly interwoven character of this proceeding on petition for certiorari and the pending motion-to-suppress proceeding before Justice Rinaldi, makes it pertinent also for us to submit to this Court at this time one additional item of information about the facts which have been developed in the evidentiary hearing in the latter proceeding:— Although Justice Rinaldi did not permit us to see the affidavits which were tendered by respondent in support of the application for the *ex parte* wiretap order, the evidence taken at the hearing before Justice Rinaldi did disclose, to some extent, what the essential basis of those affidavits was; Justice Rinaldi himself knows the con-

tents of those affidavits and his forthcoming decision may or may not explicitly reflect that knowledge. The indications from the evidence admitted by Justice Rinaldi are that the sole basis for the wiretap affidavits was an allegation of one past-committed abortion, and this allegation came from informants whose "reliability" had not been ascertained or evaluated in regard to any prior abortion information but only in regard to a batch of wholly unrelated criminal matters (burglary, arson, forgery etc.) in which the informants were personally enmeshed to so hopeless a degree as to make it easy for the police to extract the desired "cooperation" as the price of giving the informants a chance for self-preservation, the instant petitioner being in no way involved in those other criminal matters. Furthermore, we have taken the position before Justice Rinaldi that even if the informants were "reliable" within the meaning of the standards laid down by this Court, an allegation of a single past-committed abortion cannot constitutionally justify a wiretap "search" because in its very nature such could be nothing more than an unconstitutional search for "mere evidence" as distinct from "fruits" or "instrumentalities" of crime.

Reasons for Granting the Writ

1. This case illustrates the all-but grotesque sort of situation that can come about in a State which, like New York, still finds it unthinkable to give up police wiretapping notwithstanding decisions such as *Benanti* v. *United States*, 355 U.S. 96, and *Mapp* v. *Ohio*, 367 U.S. 643; cf. also the concurring and dissenting opinions in *Lopez* v. *United States*, 373 U.S. 427.

We shall indicate in a moment exactly why we ventured just now to characterize the situation in this case as bordering upon the grotesque, but first a few further words are in order concerning the status of the decisional law in this Court and in New York which relates to this situation:

The 4 to 3 decision of the New York Court of Appeals in *People* v. *Dinan*, 11 N.Y. 2d 350, cert. denied 371 U.S. 877, holding that neither §605 nor the *Mapp* case require the exclusion of illegal wiretap evidence from State criminal trials, plays to the hilt this Court's decisions in *Pugach* v. *Dollinger*, 365 U.S. 458 and *Schwartz* v. *Texas*, 344 U.S. 199. The supposed constitutionally ordained Supremacy of Federal statute law and of Federal Fourth Amendment law*. continues to be set at nought in New York State wiretapping cases.

When we said above that the situation in our particular case is all but grotesque, we meant that the doctrine has apparently been given effect in this case that the rule of unlimited admissibility of wiretap evidence in New York criminal trials is so absolutely unqualified as to result in a companion rule of likewise absolute non-justiciability of claims of illegal wiretapping. Is it conceivable that this Court in the *Schwartz* and *Pugach* cases, *supra*, intended to

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* We do not think it is hazardous to guess, from the tenor of this Court's recent decisions on electronic eavesdropping, that if §605 of the Communications Act did not exist, the Fourth Amendment would by now have come into its own in this area of "searches". See, in addition to the *Benanti* and *Mapp* cases, *Silverman* v. *United States*, 365 U.S. 505; *Elkins* v. *United States*, 364 U.S. 206; *Chapman* v. *United States*, 365 U.S. 610; the above cited concurring and dissenting opinions in *Lopez*; and Judge's Clark's dissent in *Pugach* v. *Dollinger*, 277 F. 2d 739, 747 et seq. (C.A. 2 1960), affirmed 365 U.S. 458.

countenance the erection of this kind of closed system within which State wiretap lawlessness can safely defy challenge from any and every judicial quarter? Decisions like the instant one nullify even the very recent amendatory policy pronouncements of the State Legislature itself in its remedial efforts to pay at least some attention to what this Court has been saying in cases like *Mapp* and *Benanti*. If an *ex parte* wiretap order under New York's permissive Code Crim. Proc. §813-a is absolutely and forever non-reviewable in any Court and by any mode of proceeding, then what becomes of the supposedly protective features of the latter statute itself (quoted in appendix hereto *infra*, p. 35), and what becomes of the several supposedly notable statutory changes just mentioned which were adopted in 1962 by the New York State Legislature in an explicit effort to show constitutional respect for *Mapp* and *Benanti* (see N.Y. C.P.L.R. §4506, formerly N.Y.C.P.A. §345-a, with which see the Governor's statement of approval in McKinney's 1962 Session Laws of New York, p. 3677; see also N.Y. Code Crim. Proc. §§813-c to 813-e, and the Governor's memorandum in McKinney's *op. cit.*, pp. 3673-3674; and see also the revised §§791 et seq., N.Y. Code Crim. Proc., and the Governor's memorandum in McKinney's, *op. cit.*, p. 3636)? We emphasize these nullificatory impingements of the instant decision upon the State's own recently declared legislative policy changes, not, of course, because we expect this Court to monitor the State courts' interpretation of their own State's laws, but because we think that this emphasis reveals in all its starkness the intolerable condition of constitutional turmoil and constitutional frustration which persists in New York wiretapping cases despite even the earnest efforts of the State Legislature itself to "do some-

thing'' about the problem. The lesson, we need hardly say, is obvious: there now exists no other recourse except to pray this Court to ''do something'' about it.

2. Whether this case is presently ripe for this Court's intercession remains questionable, we readily admit, and indeed that is why we dwelt *supra* at such length on the problems of the relationship between the proceedings below in the instant case and the parallel proceedings in the motion-to-suppress matter now pending before Justice Rinaldi. The jurisdictional time requirements of the certiorari procedure in this Court have obliged us to make the instant presentation to this Court at this time. We respectfully request the Court to utilize its general appellate powers and, specifically, its powers to administer its own docket, in such manner as to keep the instant proceeding jurisdictionally alive until after the disposition of our aforesaid pending matter before Justice Rinaldi, if this Court should deem it necessary to take such action in order to ensure a proper ultimate disposition of the instant petition for certiorari.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted; and that the petition should not be disposed of adversely to petitioner without consideration of what may transpire upon the rendering of the forthcoming decision of Justice Rinaldi of the Supreme Court of New York, Kings County, in our pending motion there to suppress evidence.

Respectfully submitted,

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion and Judgments Below

1. Order of Court of Appeals of the State of New York Denying Permission to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of July A. D. 1963.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

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2 Mo. No. 434

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Clerk

(SEAL)

Appendix A

2. Order of Honorable Stanley M. Fuld, Judge of the Court of Appeals of the State of New York, Denying Permission to Appeal

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. STANLEY H. FULD,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

CERTIFICATE DENYING LEAVE

I, STANLEY H. FULD Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
July 10, 1963.

STANLEY H. FULD
Associate Judge

3. Order of Appellate Division Granting Motion to Dismiss Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 17th day of April, 1963.

Present:

HON. GEORGE J. BELDOCK,

Presiding Justice.

" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

—v.—

CARL I. COHEN

Appellant

ORDER ON MOTION TO DISMISS APPEAL

The above named Carl I. Cohen, defendant in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the

office of the Clerk of the County of Kings on February 26, 1963 denying appellant's motion to vacate a prior ex parte order authorizing the interception of telephone communications and the respondent having moved to dismiss said appeal herein, by a notice of motion, dated the 27th day of March, 1963

Now on reading and filing the affidavit of William I. Siegel in support of said motion and the affidavit of Eugene Gold in opposition thereto; and the said motion having been submitted by Mr. William I. Siegel, Asst. Dist. Atty. of Counsel for the respondent and submitted by Mr. Eugene Gold of Counsel for the appellant and due deliberation having been had thereon:

It is Ordered that the said motion be and the same hereby is granted, appeal dismissed.

Enter

JOHN J. CALLAHAN

4. Memorandum Decision of Appellate Division

(New York Law Journal—April 18, 1963)

By BELDOCK, *P.J.*; CHRIST, BRENNAN, HILL and RABIN, *JJ.*

Motion by respondent to dismiss appeal from order, entered February 26, 1963, denying appellant's motion to vacate a prior ex parte order authorizing the interception of telephone communications. Motion granted; appeal dismissed.

Appendix A

5. Memorandum Decision of Supreme Court of the State of New York, Kings County, Arkwright, J., Denying Motion to Vacate *Ex Parte* Wiretap Order

SUPREME COURT

KINGS COUNTY

(SPECIAL TERM—PART X)

THE PEOPLE OF THE STATE OF NEW YORK

—v.—

CARL I. COHEN

By ARKWRIGHT, *J.*

February 6, 1963

Defendant moves for an order vacating and setting aside an order of this court dated July 28, 1960, which order authorized the interception of telephone communications upon a certain telephone number listed under the name of the defendant, Carl I. Cohen, for the apparent purpose of obtaining information concerning defendant's activities in relation to the crime of abortion; and for a further order directing a hearing to determine whether there was compliance with the mandates of Section 813(a) of the Code of Criminal Procedure of the State of New York.

Section 813(a) of the Code of Criminal Procedure provides, in part, that

> "an ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred

> thirty-eight of the penal law may be issued by any justice of the supreme court * * * upon oath or affirmation of a district attorney, or of the attorney-general or an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [sic] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. * * * "

The only supporting affidavit on the instant application is that of the attorney for the defendant. He and his client admittedly have no knowledge of what was contained in the affidavits submitted on the original application but argue that on defendant's arraignment in the Felony Court, where he was charged with the crime of abortion, the District Attorney stated that the defendant has been under surveillance for a substantial period of time and that many women had been interviewed, each of whom denied having been aborted, and that the conclusion is inescapable that the failure of the District Attorney through investigation to obtain evidence against the defendant could not support the ex parte order which authorized the wire tap.

With this conclusion, I do not agree as it is quite apparent that the information supplied the court and upon which the

court acted may not have been limited to the knowledge of the women above referred to.

Based, however, upon the above reasoning, the defendant seeks a hearing to determine whether the information submitted to the court was legally sufficient to support the said ex parte order.

The essence of the application is that no sufficient proof was submitted to the court establishing reasonable ground for believing that evidence of the crime might be obtained pursuant to the said statute and that the order was improperly issued.

It must be clear that orders under Section 813(a) of the Code of Criminal Procedure and the supporting affidavits thereof must be surrounded with such secrecy as is necessary to effectuate the intent of the statute. Were it otherwise the statute would be useless. In the application, the judge issuing the order is vested by said statute with the authority to examine on oath the applicant and the witnesses he may produce, if he so desires, to satisfy himself of the existence of reasonable grounds for the granting of such application. It must be presumed that in issuing the order the issuing justice exercised sound discretion and that the order was issued upon the sufficient proof required.

Although the Code, as is conceded, contains no provision for a review of the original order, it is not likely that it will be here argued that on a proper application, a justice could not reconsider or vacate his own order. In a situation where a justice has been retired for age, has resigned or is deceased, a circumstance applicable here, a different problem arises. In a hypothetical case, should it be discovered that

perjury had been committed in the affidavits supporting the original application; or should an affiant since making an affidavit discover that he had been in error; or should some other equally cogent reason present itself, a reconsideration certainly would be proper and necessary in the interests of justice. The authority to review the order in those cases is inherent in the court. No such situation has been presented here.

The application is denied in toto.

G. A. A.
J. S. C.

Filed: Feb. 8, 1963.

Appendix A

6. Order Appealed From Denying Defendant's Motion to Vacate and Set Aside *Ex Parte* Order, etc.

At a Criminal Term, Part I of the Supreme Court of the State of New York held in and for the County of Kings on the 26 day of February 1963.

Present:

HON. GEORGE A. ARKWRIGHT

Justice

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

—against—

CARL I. COHEN,

Defendant.

The following papers read and proceedings had on this motion:

1. The Notice of Motion and Petition dated January 24, 1963;

2. • • •

3. • • •

4. • • •

5. The answering affidavit of William I. Siegel sworn to the 29th day of January, 1963

6. • • •

7. • • •

And the District Attorney opposing the motion;

Now, on filing the decision of the Court dated February 6, 1963, denying the motion;

Upon the foregoing papers and proceedings, and after due deliberation, it is

ORDERED, that the motion for an order vacating and setting aside an order of this court authorizing interception of telephone communications be and the same hereby is denied.

GEORGE A. ARKWRIGHT
Justice of the Supreme Court

APPENDIX B

Statutes Involved

1. 47 U.S.C. §605

§ 605. UNAUTHORIZED PUBLICATION OR USE OF COMMUNICATIONS

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the

existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *

2. N.Y. Code Crim. Proc. §813-a (McKinney's)

§ 813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead[1] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is

[1] So in original. Probably should be "overheard".

in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

L.1958, c. 676, eff. July 1, 1958, among other changes, in catchline substituted "eavesdropping" for "interception, overhearing or recording"; in sentence beginning "An ex parte order" substituted "eavesdropping as defined * * * the penal law" for "the interception * * * telephonic communications" preceding "may be issued by" and added "and, in the case of * * * telegraph line involved"; in second sentence beginning "Any such order," substituted "the eavesdropping authorized therein" for "intercepting, overhearing * * * instruments described", and in sentence beginning "A true copy" added "and, in the event * * * justice denying the same."

3. N.Y. Code Crim. Proc. §§813-c to 813-e (McKinney's)

TITLE II-B

OF MOTIONS FOR RETURN OF PROPERTY OR FOR THE SUPPRESSION OF EVIDENCE ALLEGED TO HAVE BEEN OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURE [NEW]

Sec.

813-c. The motion in general.
813-d. Time of making and determination.
813-e. In what courts made.

Title added by L. 1962, c. 954, §1, eff. April 29, 1962.

§813-c. The Motion in General

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§813-d. Time of Making and Determination

The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of

the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

If a motion has been made and denied before trial, the determination shall be bindng upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

When the motion s made before trial, the trial shall not be commenced until the motion has been determined. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§ 813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held

by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, § 1, April 29, 1962.

Appendix B

4. N.Y. C.P.L.R. §4506 (McKinney's) (former N.Y. C.P.A. §345a)

§ 4506. Eavesdropping evidence

Evidence obtained by any act of eavesdropping, in violation of section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, or by eavesdropping without court order, as permitted by said section of the code of criminal procedure, when an application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section seven hundred thirty-eight of the penal law or section eight hundred thirteen-b of the code of criminal procedure. As amended L.1962, c. 318, § 20.

Amendments

L.1962, c. 318, § 20, eff. Sept. 1, 1963, among other changes, included criminal actions and inserted proviso clause.

Source of Section

C.P.A.1920, § 345-a added L.1957, c. 880.